Supreme Court of the United States.

No. 64.—October Term, 1900.

e Southern Railway Company, Plaintiff in Error, *vs.* The Postal Telegraph-Cable Company.	In error to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 7, 1901.]

This was a proceeding commenced by the Postal Telegraph-Cable Company (hereinafter called the telegraph company) against the Southern ilway Company (hereinafter called the railway company) to acquire condemnation the right to construct its telegraph line along and over e railway company's right of way through the State of North Caroa. The petition therefor was filed by the telegraph company in the ce of the clerk of the Superior Court of Guilford County, North Caroa, on June 11, 1898. A summons was issued requiring the railway mpany to appear before the clerk of the Superior Court on June 22, 98, and answer. On that day the railway company entered a special pearance and filed a petition and bond for the removal of the case to e United States Circuit Court for the Western District of North Caroa. Sundry proceedings were had in that court, such as a motion to mand, which it is unnecessary to notice. On August 31, 1898, the egraph company by leave filed an amended petition. On September , 1898, the court made an order by which it directed its clerk to point three commissioners to assess damages, and prescribed their wers and duties. On September 19, 1898, the clerk appointed the mmissioners as directed, and fixed the time and place for their meeting, d on the same day issued a notice to the railway company of his action. ese orders were made on the application of the telegraph company and thout notice to the railway company. Thereupon the railway company ved the court to set aside its order of September 15 and for leave to swer. On September 23 the court temporarily suspended the order of ptember 15. On October 24 an answer was filed, a demurrer of the egraph company was sustained, and when the railway company asked ave to introduce testimony sustaining the averments of its answer the urt overruled the application and refused to permit the railway comny to introduce testimony, and so far as was needed reinstated its order

ing for the assessment of damages by the commissioners and the confirmation of their award by the court, a writ of error and supersedeas was obtained by the railway company, and the case was transferred under such writ of error to the Circuit Court of Appeals for the Fourth Circuit. That court, on March 31, 1899, dismissed the writ of error for want of jurisdiction, on the ground that no final order had been entered in the Circuit Court. (35 C. C. A. 366.) To review this ruling this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

The single question we deem it necessary to consider is whether a final judgment or order had been entered by the Circuit Court which could be taken by writ of error to the Circuit Court of Appeals.

Luxton v. *North River Bridge Co.*, (147 U. S. 337, 341,) is decisive of this question. Indeed, little more seems necessary than a reference to the opinion in that case. There, as here, in condemnation proceedings, an order was made appointing commissioners to assess damages. To reverse this order a writ of error was sued out, and by that writ of error an attempt was made to challenge the constitutionality of the act authorizing the condemnation, but this court dismissed the writ on the ground that the order was not a final judgment, saying, after referring to possible proceedings in the State court, that the action of the United States Circuit Court could be reviewed here "only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. (Act of September 24, 1789, c. 20, § 22; 1 Stat. 84; Rev. Stat. § 691; *Rutherford* v. *Fisher*, 4 Dall. 22; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Louisiana Bank* v. *Whitney*, 121 U. S. 284; *Keystone Co.* v. *Martin*, 132 U. S. 91; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536.)"

Reference is made by counsel to *Wheeling & Belmont Bridge* v. *Wheeling Bridge*, (138 U. S. 287,) in which this court sustained its jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, and inquired into the validity of a judgment of that court affirming an order of a trial court appointing commissioners under a somewhat similar statute. But that decision was based on the fact that the order of the trial court had been held by the State Supreme Court to be a final judgment, on which a writ of error would lie, and therefore, being a final judgment in the view of the highest court of the State, it ought to be considered final here for the purposes of review. But no such ruling obtains in the Supreme Court of North Carolina. On the contrary, that court has repeatedly held that an

ent, nor subject to review until after the confirmation of the award of mmissioners. *American Union Telegraph Company* v. *Wilmington, bia & Augusta Railroad Company*, (83 N. C. 420,) is a case directly nt. In that case a proceeding was commenced by a telegraph ny to obtain a right of way for the construction and operation of egraph lines along the roadway of a railroad company, and, as by the opinion of the Supreme Court, at a hearing before the dge he adjudged the telegraph company entitled to the right of nd appointed commissioners to ascertain and report the damages. empt was made to take this order to the Supreme Court for review, e right to do so was denied, the court saying (p. 421):

pon a careful examination of the statute, and the portions of the act ruary 8th, 1872, by reference incorporated with it, and regarding licy indicated in both to favor the construction and early comple- such works of internal improvement, telegraphic being upon the ooting as railroad corporations, we are of opinion it was not intended e enactments to arrest the proceeding authorized by them at any ediate stage, and the appeal lies only from a final judgment. Then t before may any error committed during the progress of the cause, ade the subject of exception at the time, be reviewed and corrected appellate court, and an appeal from an interlocutory order is ture and unauthorized."

Commissioners v. *Cook*, (86 N. C. 18,) the same ruling was made e prior case in terms affirmed. Again, in *Norfolk & Southern Rail- Company* v. *Warren*, (92 N. C. 620,) the two prior cases were cited pproved. Still again, in *Hendrick* v. *Carolina Central Railroad ny*, (98 N. C. 431,) the same ruling was made, although it appeared e facts were all agreed upon, the court saying (p. 432):

at the defendant broadly denies the plaintiff's alleged rights and nces, and the parties agreed upon the facts, could not give the right al at the present stage of the proceeding, because the order appealed as nevertheless interlocutory, and an appeal from the final judg- ould bring up all questions arising in the course of the proceeding, t denying or impairing any substantial rights of the defendant. e order appealed from is very different from that in the similar *Click* v. *The Railroad Co.*, decided at the present term; in the he court denied the motion for an order appointing commissioners, smissed the proceeding, thus putting an end to the right of the ff therein, and therefore an appeal lay in that case."

changes in the statute referred to by counsel for plaintiff in error, ubsequently to these decisions, may affect the mode of procedure e basis for estimating damages, but in no manner affect the question he finality of the order appointing commissioners.

her does the order made by this court at the last term denying the

ing determined simply our jurisdiction, not that of the Circuit Court of ppeals. That we have jurisdiction in such a case had already been udged. (*Aztec Mining Company* v. *Ripley*, 151 U. S. 79.) Having isdiction to examine the proceedings in the Circuit Court of Appeals, we had found its ruling erroneous, we should have reversed its order missing the writ of error, but as we hold that its ruling was correct, its lgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.